No. 17,432

IN THE

United States Court of Appeals

For the Ninth Circuit

OLSON TOWBOAT COMPANY, OLSON STEAMSHIP Co., the Tug "JEAN NELSON", the Barge "FLORENCE",

Appellants,

vs.

JOAO DUTRA,

Appellee.

BRIEF FOR APPELLEE

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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Appellant sets forth three statements of points involved in this appeal.

Regarding point No. 1, it would be more correct to state "is the appellee entitled to a verdict for general and special damages from the appellant herein because of the fact that his finger was cut upon his letting go of a mooring line". There is no question but what the injury happened upon his letting go, or if after he let go, the "after" was a minute fraction of a second upon his letting go and not a minute or five minutes later. There is no doubt that the line was responsible for the cut . . . like a slice . . . like a fillet. (Page 28 of Transcript.)

Regarding point No. 2, appellee did show negligence and unseaworthiness on the part of appellant. Obviously the mooring line was defective and the vessel was unseaworthy because of said defective mooring line and such was the proximate cause of the injury suffered by appellee.

Regarding point No. 3, there is no speculation of ownership of the mooring line by appellant or of a defect in the wire loop, it not being necessary to prove ownership by appellant of a line being used to moor appellant's vessel to the dock and the defect in the line can be inferred by the evidence presented in this case.

ARGUMENT

Evidence was introduced in this case as follows at page 27 of the transcript:

> "A. For the man of the crew also there to help us working that day. He told me 'O.K., let her go' and when I let her go something in my hands cut me and my finger. I didn't see proper because I am in a hurry and blood comes out and I put my handkerchief down here around and keep working but I couldn't do a proper job—in my hand it hurts me."

At page 37 of the transcript: upon cross-examination:

> "A. You have to loose it from the dock. First I leaned down and pulled it out and back and pulled it out the way the guy told me and then let it go. It's heavy. You have to stand back like this. When I let it go it cut my hands."

At pages 38 and 39 of the transcript: upon cross-examination:

"Q. How long did that whole operation take?

A. I don't know. Fast, fast as you can think. You can't do it slow."

* * * * *

"Q. Up to this day you don't actually know what caused your finger to be cut, do you?

A. I know something in the loop.

Q. Do you know what actually caused the tear?

A. Something in the loop to cut my finger.

Q. You never saw anything, did you Mr. Dutra?

A. No, I couldn't see—you got to pick it up fast and let it go.

* * * * *

Q. You didn't see it?

A. I couldn't pay any attention. You have to work fast. There's no time to take a look."

The negligence of appellant and the unseaworthiness of appellant's vessel can certainly be inferred by the court from the above testimony.

As stated in *Cowgill v. Boock,* 19 ALR 2d 405, 218 Pac. 2d 445,

"It is not necessary to establish a cause of action by direct evidence; negligence may be inferred from the facts and circumstances surrounding an accident."

At 20 Am. Jur. Sec. 272, p. 259, it is stated

"in the absence of a statute or a valid contractual provision to the contrary, circumstantial evidence is regarded by law as competent to prove any

> given fact in issue in a civil case and is sometimes as cogent and irresistible as direct and positive testimony."

At 20 Am. Jur. 272, p. 260 it is stated

> "Negligence and freedom from contributory negligence may be shown by circumstantial as well as by direct proof, and to this end in negligence actions any evidence as to the conditions and circumstances leading up to and surrounding the accident out of which the cause of action arose which will throw light upon the conduct of the parties and the care or lack of care exercised by them at the time of the accident is admissible."

In the case now presented before this appellate court, appellee was ordered to cast off a line from the barge to the dock. It was a nylon line but at its end was a wire loop which was the part appellee had to lift off of the bit on the barge and let go when ordered. The whole operation is done fast. You cannot do it slow. Other lines had already been cast off and this was the last one to be let go. The barge normally would be under way as this line in question is cast off. There was no time for appellee as he moved from line to line in casting them off to minutely inspect the condition of each line. It was the nondelegable duty of appellant to furnish said barge with a seaworthy line and one that would not cut appellee's finger upon his casting the same off. The testimony in this case is that upon appellee letting go said line he suffered the injury that gave rise to this lawsuit. There can be no conclusion except that there was a defect in the wire loop which cut appellee's

finger. If there was no defect there would be no cut. The line was being used by the barge upon which appellee was required to work and whether it belonged to the dock or to the barge is of no consequence as it was ship's equipment while being maintained aboard said vessel for the purpose for which it was being used.

The instrumentality (the mooring line) was under the control and management of appellant. Common knowledge and experience creates a clear inference that the accident would not have happened if there was not some defect in the mooring line and obviously appellee's injury resulted from his handling of said mooring line. Thus, all of the elements of res ipsa loquitur are present and this alone creates a rational inference of appellee's negligence and relieves appellee of the necessity of producing evidence of specific acts of negligence. See 46 ALR 2d 1212.

The case of *Petterson v. Alaska S.S. Co., Inc.,* 205 Fed. 2d 478, is determinative of the issues raised by appellant regarding ownership of the mooring line and condition of same at the time of the injury. In the *Petterson* case a block was brought aboard the vessel by a stevedoring company and while being put to a proper use in a proper manner the block broke causing the injuries complained of to Petterson. There was no proof as to the condition of the block prior to its use other than what might be implied from the accident. In the case now presented before this appellate court, the mooring line was part of the ship's equipment while being used and was the instrumen-

tality that caused the injury to appellee and even though there was no direct proof as to the condition of the mooring line at the time that appellee was injured, the condition of same can be implied from the fact of the accident. As stated in the *Petterson* case at page 459:

> "The owner contends that as there was no proof of the unseaworthiness of the block Petterson cannot recover. This contention is without merit . . . and this court may make its own inferences from the facts as found where it does not upset the findings based upon the credibility of the witnesses. If the block was being put to a proper use in the proper manner, as found by the district judge, it is a *logical inference* that it would not have broken unless it was defective—that is, unless it was unseaworthy. (Emphasis added.)
>
> In making this inference we do not rely upon the tort doctrine of res ipsa loquitur, although the result is similar. Res ipsa loquitur is a doctrine of causation usually applied in cases of negligence. Here we are dealing with a specie of strict liability regardless of fault."

See also *Litwinowicz v. Weyerhaeuser Steamship Company,* 179 Fed. Supp. 812.

Appellant relies on the case of *Freitas v. Pacific Atlantic Steamship Co.,* 218 F. 2d 562, however it is appellee's contention that the *Freitas* case is not applicable and is not controlling in this case and at this time.

Appellant further relies on *King v. Nicholson Trust Company,* 46 N.W. 2d 389, 1957 A.M.C. 1888 at page

1892 for his argument that the trial court's judgment was based on speculation. In the *King* case the deceased had fallen to the bottom of a drydock and the question before the court was whether he had fallen from an allegedly defective gangplank that ran from the ship to the top of the drydock or whether he had fallen from some other part of the ship. In the *King* case an inference could be drawn that decedent fell from the alleged defective gangplank by reason of the location of his body on the floor of the drydock but there was evidence also that had he fallen from the gangplank or from the top of the drydock or from the ship that he could have landed where he did. Therefore, the evidence was susceptible to three different inferences. In the case now presented before this appellate court, there is only one inference that can be drawn from the evidence as to how appellee was injured and that is that he was cut by a defect in the line that he was handling.

Appellant relies upon *Moore v. Chesapeake & Ohio Railroad Company,* 340 U.S. 573 at page 578 that speculation cannot supply the place of proof. Again in the *Moore* case the decedent had been employed as a brakeman in respondent's switching yards. Decedent was standing on the foot board at the rear of a tender and his duty was to give signals to the engineer who was operating the train and who could see the decedent's arm and shoulder at all times. The engineer testified that he saw the decedent slump, as if his knees gave way, right himself, then tumble forward to the outside of the track. The engineer made an

emergency stop, but the train ran the length of the tender and about a car length and a half before it stopped. Decedent died as a result of his injuries. Petitioner alleged the negligence was respondent's engineer making a sudden and unexpected stop without warning thereby causing decedent to be thrown from a position of safety on the rear of the tender into the path of the train. The only witness was the engineer who testified as above and that he received no sign to stop and had no reason to stop until he saw the decedent fall. Petitioner failed to prove decedent fell after the train stopped without warning. The evidence showed he fell before the train stopped. The court held that in order to sustain petitioner one would have to infer from no evidence at all that the train stopped when and where it did for no purpose at all, contrary to all good railroad practice, prior to the time decedent fell, and then infer that decedent fell because the train stopped. This would be speculation run riot. In the case now presented before the appellate court, this is what appellant refers to on page 7 of his brief when he said "this would be speculation run riot. Speculation cannot supply the place of proof." However, in the case now presented we do not have to infer an inference upon an inference upon an inference upon an inference upon an inference but only to infer one inference based upon the evidence.

It is to be noted in the *Moore* case that there was a dissent by Justices Black and Douglas who stated "unless we are to require the element of proximate cause to be proved by eye-witnesses' testimony, a rea-

sonable jury certainly could infer from the foregoing facts that the sudden stopping of the engine threw decedent to his death."

CONCLUSION

For the foregoing reasons, it is submitted that the evidence justifies the findings of fact and conclusions of law and that this court should approve the findings made by the district court and affirm the judgment.

Dated, San Francisco, California,
January 3, 1962.

Respectfully submitted,
FRANCIS J. SOLVIN,
Proctor for Appellee.